

3 FAH-1 H-1520

PROCESS FOR DEPARTMENT OF STATE CIVIL SERVICE AND FOREIGN SERVICE EMPLOYEES OR EMPLOYMENT APPLICANTS ALLEGING SEXUAL ORIENTATION DISCRIMINATION

(TL:POH-38; 12-19-1997)

3 FAH-1 H-1521 GENERAL

3 FAH-1 H-1521.1 Purpose

(TL:POH-38; 12-19-1997)

(State Only)

(Applies to Foreign Service and Civil Service Employees)

This subchapter implements the Department's policy of equal employment opportunity without regard to sexual orientation (including sexual orientation persecution/intimidation and retaliation for opposing discrimination and/or filing or participating in the investigation of a complaint) (3 FAM 1511.1 paragraph a). These procedures are available to persons employed in the Department's Civil Service or Foreign Service appointive positions and applicants for such positions, except that non-United States citizens who are employed in, or who apply for, positions located outside the limits of the United States may not utilize the procedures established by this subchapter.

3 FAH-1 H-1521.2 Policy

(TL:POH-38; 12-19-1997)

(State Only)

(Applies to Foreign Service and Civil Service Employees)

The Department's objective is to process complaints of discrimination on the basis of sexual orientation to the maximum extent practicable, in a manner consistent with Equal Employment Opportunity Commission (EEOC) regulations (29 CFR Part 1614), as modified, clarified, and/or supplemented by these guidelines.

3 FAH-1 H-1521.3 Responsibilities

(TL:POH-38; 12-19-1997)

(State Only)

(Applies to Foreign Service and Civil Service Employees)

a. The Deputy Assistant Secretary for Equal Employment Opportunity and Civil Rights (DAS) shall ensure that complaints of sexual orientation discrimination are processed fairly and promptly.

b. The DAS, or their designee, shall promulgate and interpret procedures for processing complaints of sexual orientation discrimination, and shall act as the Department's decision-maker with respect to complaints filed under these procedures.

c. Prior to resolving a complaint filed in accordance with these procedures the DAS will assure that the Director General of the Foreign Service (M/DGP), the Office of the Legal Adviser (L), and any other appropriate officials are consulted in a finding of discrimination, the development of remedies, and settlement of complaints.

3 FAH-1 H-1521.4 Authorities

(TL:POH-38; 12-19-1997)

(State Only)

(Applies to Foreign Service and Civil Service Employees)

a. The President's explicit request (in his EEO statement dated November 22, 1993) that each Federal agency and Department establish a workplace free from discrimination and harassment, including discrimination and harassment on the basis of sexual orientation.

b. The Secretary of State's Memorandum entitled "Statement of Policy with Respect to Nondiscrimination", dated April 22, 1994, proscribes discrimination, *inter alia*, on the basis of sexual orientation. The Department restated this policy in its regulation, 3 FAM 1511.1 paragraph a.

3 FAH-1 H-1522 COMPLAINT PROCESSING

(TL:POH-38; 12-19-1997)

(State Only)

(Applies to Foreign Service and Civil Service Employees)

a. Since neither the Equal Employment Opportunity Commission nor any other outside agency has appellate jurisdiction over administrative complaints of sexual orientation discrimination, this process shall be completely internal within the Department of State. However, for purposes of efficiency and economy, the Department has chosen to incorporate the EEO counseling procedure described in 29 CFR 1614.105 in this process.

b. Sexual orientation discrimination complaints are not covered by title VII of the Civil Rights Act of 1964 and, therefore, remedies authorized under title VII are not applicable for such cases (e.g., front pay, interest on back pay, attorney fees (absent back pay entitlements), compensatory damages, or any other monetary relief other than back pay).

3 FAH-1 H-1523 EEO COUNSELING STAGE

(TL:POH-38; 12-19-1997)

(State Only)

(Applies to Foreign Service and Civil Service Employees)

a. Aggrieved persons (employees or employment applicants), who believe they have been discriminated against on the basis of sexual orientation, must consult an EEO counselor. The names and locations of such counselors may be obtained from the Department's Office of Equal Employment Opportunity and Civil Rights (S/EEOCR) (Telephone number (202) 647-9294).

b. An aggrieved person must initiate contact with an EEO Counselor within 45 calendar days after the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action. The DAS may extend the 45-day time limit when:

- The individual shows that he or she was not notified of the time limits and was not otherwise aware of them;
 - That he or she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred;
 - That despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limit;
- or

- For other reasons considered sufficient.

c. Unless the aggrieved person agrees to a longer counseling period under 3 FAH-1 H-1523 paragraph d, or alternate dispute resolution procedures are consensually used, the counselor shall conduct the final interview with the aggrieved person within 30 calendar days of the date the aggrieved person brought the matter to the counselor's attention. If the matter has not been resolved, the aggrieved person shall be informed in writing by the counselor, not later than the thirtieth day after contact of the:

- Right to file a discrimination complaint within 15 days of receipt of the notice;
- Appropriate official with whom to file a complaint; and
- Complainant's duty to assure that the Department is informed immediately if the complainant retains counsel or a representative.

d. Prior to the end of the 30-day period the aggrieved person may agree in writing with the Department to postpone the final interview and extend the counseling period for an additional period of not more than 60 calendar days. If the matter has not been resolved before the conclusion of the agreed extension, the notice described in 3 FAH-1 H-1523 paragraph c shall be issued.

e. The Department shall make every reasonable effort to resolve a complaint through alternate dispute resolution. Where the aggrieved individual agrees to participate in the Department's dispute resolution procedure the complaint processing period shall be 90 days. If the matter has not been resolved before the ninetieth day, the notice described in 3 FAH-1 H-1523 paragraph c shall be issued.

f. The counselor shall not attempt in any way to restrain the aggrieved individual from filing a complaint. The counselor shall not reveal the identity of an aggrieved person, except when authorized to do so by the aggrieved person, or until the Department has received a discrimination complaint from the aggrieved person involving the same matter.

3 FAH-1 H-1524 COMPLAINT PROCEDURES

3 FAH-1 H-1524.1 Complaint Filing

(TL:POH-38; 12-19-1997)

(State Only)

(Applies to Foreign Service and Civil Service Employees)

a. A complaint must be filed within 15 calendar days of receipt of the notice required by 3 FAH-1 H-1523 paragraphs c through e.

b. A complaint must contain a signed statement from the person claiming to be aggrieved or that person's attorney. This statement must be sufficiently precise to identify the aggrieved individual and to describe generally the action(s) or practice(s) that form the basis of the complaint. The complaint must also contain a telephone number and address where the complainant or the representative can be contacted.

c. The Department shall acknowledge receipt of a complaint in writing and inform the complainant of the date on which the complaint was filed.

3 FAH-1 H-1524.2 Dismissal of Complaints

(TL:POH-38; 12-19-1997)

(State Only)

(Applies to Foreign Service and Civil Service Employees)

The DAS or delegate shall dismiss a complaint or a portion of a complaint:

(1) That fails to state a claim of sexual orientation discrimination or states a claim that is pending before or has been decided by the Department;

(2) That fails to comply with the applicable time limits contained in 3 FAH-1 H-1523 paragraphs b and c, unless the DAS extends the time limits for such good cause described in 3 FAH-1 H-1523 paragraph b, or that raises a matter that has not been brought to the attention of a counselor and is not like or related to a matter that has been brought to the attention of a counselor;

(3) That is the basis of a pending civil action in a United States District Court in which the complainant is party, or that was the basis of a civil action decided by a United States District Court in which the complainant was a party;

(4) Where the complainant has raised the matter in statutory or negotiated grievance procedure that permits allegations of sexual orientation discrimination (such as the Foreign Service grievance process) or as an affirmative defense in an appeal to the Merit Systems Protection Board;

(5) That is moot or alleges that a proposal to take a personnel action, or other preliminary step towards taking a personnel action, is discriminatory;

(6) Where the complainant cannot be located, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 15 days of a notice of proposed dismissal sent to his or her last known address;

(7) Where the Department has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, and the complainant has failed to respond to the request within 15 days of its receipt or the complainant's response does not address the Department's request; provided that the request included a notice of the proposed dismissal. Instead of dismissing for failure to cooperate, the complaint may be adjudicated if sufficient information for that purpose is available; or

(8) If the complainant refuses, within 30 calendar days of receipt of an offer of settlement to accept a Department offer of full relief containing a certification from the Department's Deputy Assistant Secretary for Equal Employment Opportunity and Civil Rights that the offer constitutes full relief; provided that the offer gave notice that failure to accept would result in dismissal of the complaint.

3 FAH-1 H-1525 INVESTIGATION OF COMPLAINTS

(TL:POH-38; 12-19-1997)

(State Only)

(Applies to Foreign Service and Civil Service Employees)

a. The DAS through duly trained EEO investigators shall develop a complete and impartial factual record upon which to make findings on the matters raised by the written complaint. The Department may use an exchange of letters or memoranda, interrogatories, affidavits, fact-finding conferences or any other probative fact-finding methods that efficiently and thoroughly address the matters at issue. The DAS shall incorporate alternative dispute resolution techniques in its investigative efforts to promote early resolution of complaints.

b. The complainant, the Department, and any employee of the Department shall produce such documentary and testimonial evidence as the investigator deems necessary.

c. Investigators shall adduce documentary and testimonial evidence pertinent to the complaint allegations. Witnesses shall be subject to penalties under 18 U.S.C. 1001 for knowing and willful false statements.

d. When the complainant or the Department and its employees fail, without good cause shown, to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the investigator may note in the investigative record that the decision maker may, in appropriate circumstances:

(1) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(2) Consider the matter to which the requested information or testimony pertains to be established in favor of the opposing party;

(3) Exclude other evidence offered by the party failing to produce the requested information or witness;

(4) Issue a decision fully or partially in favor of the opposing party; or

(5) Take such other actions as it deems appropriate.

e. The DAS shall make every effort to complete the investigation within 180 days of the date of filing the complaint.

f. Upon completion of the investigation, the DAS or delegate shall notify the complainant that the investigation has been completed and shall provide the complainant with a copy of the investigative file.

3 FAH-1 H-1526 HEARINGS

(TL:POH-38; 12-19-1997)

(State Only)

(Applies to Foreign Service and Civil Service Employees)

There shall be no right to a hearing under these procedures. There shall be no hearing by the Equal Employment Opportunity Commission because the Commission does not have jurisdiction over sexual orientation complaints.

3 FAH-1 H-1527 DECISIONS

(TL:POH-38; 12-19-1997)

(State Only)

(Applies to Foreign Service and Civil Service Employees)

The DAS or delegee shall issue a written decision based upon the investigation and matters of official record and notice. The decision shall consist of findings on the merits of each issue in the complaint and, when discrimination is found, shall award such appropriate remedies and relief as the DAS deems appropriate and as authorized by law. Such remedies and relief may include, as appropriate:

- Employment offers to applicants;
- Back pay and the consequent restoration of related benefits (e.g. annual /sick leave and retirement creditable service;
- Promotional relief;
- Reassignments;

- Cancellation of discriminatory personnel actions; and
- Expungement of adverse documentation from Department Records.

Such decisions are administratively final and nonreviewable. In cases where the DAS finds discriminatory practices or procedures should be eliminated, the DAS shall make such a recommendation to the Under Secretary for Management.

3 FAH-1 H-1528 MULTI-BASIS COMPLAINTS

(TL:POH-38; 12-19-1997)

(State Only)

(Applies to Foreign Service and Civil Service Employees)

In the event a complaint is filed which contains an allegation of discrimination based on sexual orientation and additional bases covered by EEOC regulations, all allegations will be investigated concurrently. However, following the investigation, those allegations not based on sexual orientation will be processed in accordance to existing procedures outlined in 29 CFR 1614 and the DAS will determine whether to proceed with a final decision regarding the sexual orientation allegation or to defer action on the sexual orientation allegation until the 29 CFR 1614 procedures are exhausted.

3 FAH-1 H-1529 MATTERS OF GENERAL APPLICABILITY

3 FAH-1 H-1529.1 Consensual Settlement Encouraged

(TL:POH-38; 12-19-1997)

(State Only)

(Applies to Foreign Service and Civil Service Employees)

The DAS shall make all reasonable efforts to settle voluntarily complaints of sexual orientation discrimination as early as possible in, and throughout, the administrative processing of the complaints, including the pre-complaint counseling stage. Any settlement reached shall be reduced to writing and signed by both parties and shall identify the allegations resolved.

3 FAH-1 H-1529.2 Representation and Official Time

(TL:POH-38; 12-19-1997)

(State Only)

(Applies to Foreign Service and Civil Service Employees)

a. At any stage in the processing of a complaint, including the counseling stage, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice.

b. The complainant shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to the Department requests for information. If the complainant designates another employee of the Department as his or her representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and respond to Department requests for information. The Department is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer. The complainant and representative, if employed by the Department and otherwise in pay status, shall be on official time, regardless of their tour of duty when their presence is authorized or required by the Department during the investigation, settlement or alternative dispute resolution activities on the complaint.

3 FAH-1 H-1529.3 Disqualification of Representative

(TL:POH-38; 12-19-1997)

(State Only)

(Applies to Foreign Service and Civil Service Employees)

In cases where the representation of a complainant would conflict with the official or collateral duties of the representative, the DAS may, after giving the representative an opportunity to respond, disqualify the representative.

3 FAH-1 H-1529.4 Official Correspondence with Representative

(TL:POH-38; 12-19-1997)

(State Only)

(Applies to Foreign Service and Civil Service Employees)

a. Unless the complainant states otherwise in writing, after the DAS has received written notice of the name, address, and telephone number of a non-attorney representative for the complainant, all official correspondence shall be with the representative with copies to the complainant.

b. When the complainant designates an attorney as representative, service of documents and decisions on the complaint shall be made on the attorney and not on the complainant, and time frames for receipt of materials by the complainant shall be computed from the time of receipt by the attorney.

c. The complainant must serve all official correspondence on the designated representative of the Department.

3 FAH-1 H-1529.5 Complainant Responsibility

(TL:POH-38; 12-19-1997)

(State Only)

(Applies to Foreign Service and Civil Service Employees)

The complainant shall at all times be responsible for proceeding with the complaint, whether or not he or she has designated a representative.

3 FAH-1 H-1529.6 Official Time for Witnesses

(TL:POH-38; 12-19-1997)

(State Only)

(Applies to Foreign Service and Civil Service Employees)

Witnesses who are Department employees, regardless of their tour of duty, shall be in a duty status when their presence is authorized or required by Department officials and/or an investigator in connection with a complaint.